FILED
NOV 2 1 1997
Clerk, U.S. District Court
Eastern District of California
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA

BOBBY GENE HENRY

Plaintiff, No. CIV S-95-2055
DFL-DAD-P

v.

PEGGY KERNAN, et al., ORDER

Defendants.

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States magistrate judge under 28 U.S.C. § 636 (b)(1)(B) and Local General Order No. 262.

On June 6, 1997, the magistrate judge filed findings and recommendations. Respondents have filed objections to the

findings and recommendations, and petitioner has filed a reply.

I have conducted a de novo review of this case. I have read all of the pleadings, the relevant portions of the trial transcript, the record of the suppression hearing and the decision by the state trial judge, the opinion of the Court of Appeal, and the findings and recommendations. I have listened to the relevant portions of the tape recording of the interview that is at issue.

The facts and the standard of review are correctly set forth in the findings and recommendations. Every judicial officer who has examined this case has been troubled by the deliberate violation of the petitioner's request that the interrogation terminate so that he could consult with an attorney. Beyond suppression of evidence, such a practice could subject the Sheriff's Deputies to internal discipline or to a civil suit for damages, see Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992). In addition, the Sheriff's Department may be subject to a suit for injunctive relief if the Deputies'

practice in this case is the policy of the Sheriff's Department.

But the question here is whether the Deputies' conduct was such that petitioner's statement were involuntary and therefore inadmissible for impeachment purposes under Harris v. New York, 401 U.S. 222 (1971). After Miranda warnings were given to petitioner the following exchange occurred:

[Officer}: You understand your rights Bobby?

Henry: I think so.

. . . . . .

[Officer}: . . . You have any questions about your rights?

Henry: . . . can I have my lawyer here, I don't know.

[Officer}: That's ah up to you; you're entitled to have an attorney present before you're questioned.

Henry: Right. Probably should have one now.

[Officer}: You do want an attorney?

Henry: Yes, please

[Approximately 25 second pause. No one speaks.]

[Officer}: Why did you shoot him.

Henry: Cheated me out of money, I was loosing [sic] my property.

[Officer}: How much money you talking about.

Henry: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

{Officer}: How—how did he have your money, anyway

Henry: I gave it to him

{Officer}: Was it cash you gave to him.

Henry: I wrote him checks. Am I supposed to keep taking [sic] without an attorney. Was I—

[Officer}: Listen, what you tell us we can't use against you right now.

Henry: Okay.

[Officer]: We'd just like to know.

This discussion occurred in a relaxed setting in a room in administrative offices of the Sheriff's Department. All of the participants, including petitioner, spoke in a quiet, matter of fact tone of voice. The two officers who participated were not in uniform. The petitioner was not handcuffed. The interview went on for approximately one hour, and was tape recorded in its entirety.

The officers ignored Henry's request for counsel and, when Henry seemed to hesitate, they told him "what you tell us we can't use against you right now" and "we'd just like to know." The State Court of Appeal concluded that this conduct was not sufficiently overbearing or misleading to render Henry's statements involuntary in the circumstances. I agree with the reasoning of the State Supreme Court and cannot improve upon it:

> A major flaw in defendant's reasoning is that his most incriminating statement, his assertion that he shot Withrow because he was losing his money and Withrow was cheating him, was made before the officers suggested defendant's statements would not be used against him. Thus, this evidence was not the result of the officers' deception.

> The use of deceptions by interrogating officers may render a defendant's statement involuntary. However, the deception must be of a type which would be reasonably likely to procure a false confession. [citation omitted] We see nothing in the facts of this case which suggest the officer's statements would have caused defendant to confess falsely. The statements of the officers do not have the appearance of an action which would have overcome defendant's resistance and broken his free will.
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> In effect, all the officers did was to negate the prior Miranda warning, so that it is as though defendant had made his statements without having received the required warnings. It is clear that a statement is not 'involuntary' simply because the warnings have not been given. Those were exactly the facts of Harris in which the court held the statements were admissible for impeachment. [citation omitted]
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> . . . .
>
> Had the officers employed a variety of emotional manipulations, including improper threats and promises or other coercive methods, their acts might be significant. However, this was not the case. The questioning lasted only an hour and the officers never made improper promises of leniency or threats of more harsh treatment. They took no actions to pressure defendant into confessing.

Court of Appeal opinion at 8-9, Resps.' Ex. 1.

Both Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992), and Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en

banc), relied upon by petitioner, involved much more egregious conduct and different factual and legal circumstances.

For the reasons stated above and by the State Court of Appeal, the court finds that the statements by Henry to Sheriff's Deputies Machen and White were not involuntary.[1/] The court adopts the discussion in the findings and recommendations concerning petitioner's claim that the admission of his statements to Dr. Sander violated a constitutional right to privacy.

Accordingly, IT IS SO ORDERED that:

1. The findings and recommendations filed June 6, 1997, are adopted in part and rejected in part as noted above;

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1. Alternatively, even if the statements that followed the misleading statements by the officers were involuntary, these statements were of no consequence at the trial. Indeed, the prosecutor mainly emphasized what Henry had not said to the Deputies concerning self-defense as opposed to what he had said. As to admissions as contrasted to omissions, it was Henry's initial admission that he shot Withrow because Withrow had cheated him which was probative, and this statement came before the officers suggested that his statements could not be used "right now."

2. Petitioner's petition for a writ of habeas-corpus is DENIED.

Dated: 19 November 1997.

/s/

DAVID F. LEVI
United States District Judge